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Via electronic mail

Re: Notice of Preparation of a Statewide Program EIR for a General Exception to the California Ocean Plan for Discharges into ASBSs

Dear Ms. Anderson:

We are writing to comment on the Notice of Preparation ("NOP") of an Environmental Impact Report ("EIR") and attached Initial Study ("IS") for a General Exception to the California Ocean Plan Waste Discharge Prohibition for Selected Discharges (the Exception) into Areas of Special Biological Significance ("ASBS"). We have advocated for the implementation of the decades-old Ocean Plan discharge prohibition for years, and were active in the process to address the ongoing discharges to ASBSs.

After a significant investment of staff time by our organization as well as by the State Water Resources Control Board, we are disappointed and concerned to review the NOP, its attached IS, and the revised Exception. Rather than implement the discharge prohibition, or at least ensure its implementation within a fixed time frame, the proposed Exception instead renders the Ocean Plan's clear and readily enforceable discharge prohibition opaque and internally inconsistent, and makes enforcement far more resource intensive for Regional Boards or the public. Moreover, this extremely broad Exception addresses 28 varying applications for a myriad of discharges into 26 of the 34 ASBSs, sweeping the majority of existing discharges into its provisions.[1] This makes public review of its provisions and of the data supporting the proposed Exception, as intended by the language of the Ocean Plan Exception process (Section III.J.), virtually impossible. Furthermore, the Exception fails to include clear interim or final deadlines, or other assurances that the affected discharges will be eliminated as first required by the State Board over 35 years ago.

[1] This raises the question of what the State Board intends the legal status of the remaining eight ASBSs to be—is it the State Board's intention that the discharge prohibition in the Ocean Plan remain in place for those ASBSs? Past experience with almost zero enforcement begs the additional question of how the prohibition will be enforced for these eight areas (as well as dry weather discharges still subject to the discharge prohibition).

Seven years after publicly identifying over 1,600 illegal discharges going into ASBSs, the State Board's proposed plan of action, rather than to finally begin enforcement, is to formally excuse most of these ongoing discharges from the waste discharge prohibition for at least four years more, and possibly an indeterminate period of time beyond that. The State Board has given no reason for failing to choose to enforce the discharge prohibition within the Ocean Plan's time frame for review of the Exception, or at least adopt a time schedule order for discharges to come into compliance with the Ocean Plan. Instead, after formally informing dischargers in 2004 that their releases were illegal, and after years of subsequent stakeholder meetings (and many more years by the undersigned in advocating for strong enforcement against illegal discharges, as illustrated in Attachment A), the Board now proposes again another excessively long delay.

By affirmatively allowing discharges to continue for at least four more years, and perhaps an indeterminate time following that, the Exception violates existing Ocean Plan standards protecting the ASBS beneficial use. Further, given that issuing the Exception as written would constitute a variance to a water quality standard for Exception applicants, the State Board at a minimum would need to prepare, in addition to an EIR, a Use Attainability Analysis, additional variance analysis pursuant to Federal Regulations, and a detailed Anti-Degradation Analysis. The current proposal to prepare merely an EIR is legally inadequate; adoption of an Exception under simply an EIR would require substantial changes to the proposed Exception to be legal. In either case, an intensive analysis consuming considerable staff resources will be required to move forward with the proposal to formally and broadly exempt the ongoing discharges from the Ocean Plan.

Accordingly, we request that staff abandon this particular, overly broad Exception process, and instead either develop discharge/applicant/ASBS-specific Exceptions as intended by the Ocean Plan, along with Time Schedule Orders for compliance that include interim milestones and a final deadline consistent with the review called for in the Ocean Plan; or issue enforcement orders in the form of cease and desist orders (CDOs) or cleanup and abatement orders (CAOs) providing for compliance schedules. These orders could be issued in a matter of months, can contain some of the same substantive requirements as those in the proposed Exception, and would begin the process of bringing dischargers into compliance now.

If staff persists with the proposed, excessively broad Exception, then it must comply with state and federal law. The following comments address these legal requirements, as well as the proposed Exception's other current legal inadequacies and inconsistencies.

A. The Ocean Plan and Public Resources Code Currently Prohibit the Discharge of Waste into ASBSs.

The Ocean Plan defines ASBSs as "those areas designated by the State Water Board as ocean areas requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable."[2] In order to protect "natural" – i.e., non-anthropogenically altered – water quality, the Ocean Plan further provides, "Waste shall not be

[2] Ocean Plan, Appendix I, at 24.

discharged to areas designated as being of special biological significance. Discharges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in these areas."[3] In other words, the Ocean Plan recognizes that pollution discharges into ASBSs alter natural water quality and impact the sensitive communities and species that are the basis for the ASBS designation. Therefore, the Ocean Plan bans pollution discharges unless the State Board complies with the exception provisions under Section III.J. Moreover, even under those circumstances the allowance of such discharges *must* be reviewed at least every three years.[4]

The Public Resources Code was recently revised (SB 512, Figueroa 2004) to reinforce the discharge prohibition in statute. Defining an ASBS as a subset of a State Water Quality Protection Area, SB 512 noted that ASBSs "require special protection as determined by the State Water Resources Control Board pursuant to the California Ocean Plan," and that "waste discharges shall be prohibited or limited [in state water quality protection areas] by the imposition of special conditions in accordance with" Porter-Cologne and the Ocean Plan.[5] The legislative history of SB 512 further reinforces the Legislature's support for the ASBS discharge prohibition while providing for additional, future categories of water quality protected areas, stating that:

> Requirements in the Ocean Plan address discharges into marine "areas of special biological significance," which are defined in the Ocean Plan as marine waters that house biological communities so unique and sensitive that they cannot tolerate any degradation of natural water quality. This bill is intended to clarify that areas of special biological significance are a subset of SWQPAs, and that other categories of SWQPAs may also be designated as MMAs . . . This bill refers to existing requirements in the Porter-Cologne Act and its regulations as the appropriate authority over pollution discharges into sensitive marine waters.[6]

Consistent with the Legislature's language and intent, a 2005 State Board Resolution amending the Ocean Plan made clear that, "The classification of ASBS as a subset of SWQPAs does not change the ASBS designated use for these areas. Waste discharges to ASBS are still prohibited under the Ocean Plan unless an exception is granted."[7]

Accordingly, the requirements in the Ocean Plan—that waste not be discharged to an ASBS, and that the Ocean Plan must assure maintenance of natural water quality in ASBSs—remain operative requirements under State Board regulation, the Water Code, and the Public Resources Code.

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[3] Ocean Plan, Sec. III.E.1., at 20.

[4] Ocean Plan, Sec. III.I.2., at 23.

[5] Pub. Res. Code §§ 36700(f), 36701(f).

[6] http://info.sen.ca.gov/pub/03-04/bill/sen/sb_0501-0550/sb_512_cfa_20040811_173227_asm_floor.html.

[7] Adoption of the Proposed Amendments to the California Ocean Plan (State Board Resolution No. 2005-0035).

B. The State Board's Proposal Fails All of the Ocean Plan's Requirements for an Exception.

Any policy implementing the Ocean Plan must effectuate the Plan's purpose and be consistent with the Plan's language, and it cannot alter or amend the Plan's scope.[8] Here, however, the proposed Exception is patently inconsistent with the plain meaning and intent of the waste discharge prohibition in the Ocean Plan, a requirement put in place to ensure maintenance of natural water quality.

The Ocean Plan creates an "unambiguous prohibition"[9]—"waste shall not be discharged"—to ASBSs except under very specific circumstances that are designed to protect natural water quality and so do not apply to the proposed Exception. This is because the Exception authorizes many of the existing discharges into the majority of ASBSs under a set of terms and conditions that generally fail to provide the clear requirements and firm deadlines that are absolutely necessary – particularly after almost four decades of delay – to achieving the required discharge prohibition. By affirmatively allowing many of the existing discharges statewide to continue in this manner, the proposed Exception is inconsistent with the discharge prohibition and undermines its fundamental purpose to provide the utmost protection for the sensitive species and communities in ASBSs. Accordingly, the State Board's proposed "interpretation" of the Ocean Plan is unreasonable and inconsistent with the Plan's plain language.[10]

Indeed, in light of the very specific Ocean Plan process required to obtain an exception to the discharge prohibition, it is difficult to see how *any* statewide general exception could reasonably meet its requirements. <u>The Ocean Plan only allows the State Board to grant an exception to Ocean Plan requirements, including the discharge prohibition, as follows</u>:[11]

> 1. The State Water Board may, in compliance with the California Environmental Quality Act, subsequent to a public hearing, and with the concurrence of the Environmental Protection Agency, grant exceptions where the Board determines:
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> a. <u>The exception will not compromise protection of ocean waters for beneficial uses, and</u>,
>
> b. <u>The public interest will be served</u>.

[8] See, e.g., *Slocum v. State Board of Equalization* (2005) 134 Cal.App.4th 969, 974; *Family Planning Associates Medical Group, Inc. v. Belshe* (1998) 62 Cal.App.4th 999, 1004.

[9] *In Re: California Department of Transportation* (State Board Order WQ 2001-08).

[10] See *Motion Picture Studio Teachers & Welfare Workers v. Millan* (1996) 51 Cal.App.4th 1190, 1195.

[11] The Ocean Plan does allow the State Board to recommend certification for certain limited-term ("weeks or months") discharges into ASBSs. (Ocean Plan, Sec. III.E.2., at 20-21). However, the discharges that would be allowed by the Exception are impermissibly broader and longer in time than the very limited and specific circumstances the Ocean Plan might allow. As just one example, the most significant, continuous category of pollution—stormwater runoff—cannot be made to fit into the Ocean Plan's contemplated, specific list of "limited-term activities," particularly as the Exception allows it to continue for at least four years and possibly longer.

2. All exceptions issued by the State Water Board and in effect at the time of the Triennial Review will be reviewed at that time. If there is sufficient cause to re-open or revoke any exception, the State Water Board may direct staff to prepare a report and to schedule a public hearing. If after the public hearing the State Water Board decides to re-open, revoke, or re-issue a particular exception, it may do so at that time.[12]

As noted below, the proposed Exception fails these tests because:

- there is no evidence upon which the State Board could legitimately find that the proposed, broad general Exception to the waste discharge prohibition would not compromise the protection of the many ocean waters impacted for beneficial uses;
- the State Board has not, and cannot, find that a general Exception serves the public interest; and
- the timeframes set in the proposed Exception (at least four years, and possibly longer) prevent the meaningful, *required* examination of the Exception's effectiveness at each successive Triennial Review of the Ocean Plan.

First, there is no site- and discharge-specific data or evidence upon which the State Board could legitimately find that a general exception to the waste discharge prohibition would not compromise the protection of ocean waters for beneficial uses (see also Section D.4. below for further discussion on data). Indeed, in a precedential decision, the State Board already concluded that any waste discharge to an ASBS constitutes a violation of the Ocean Plan.[13] Moreover, these are not small amounts of waste. Rather, the State Board generally has found that that stormwater pollution is the largest threat of pollution to California's waters—including to ASBSs—which results in impairment, beach closings and advisories, and economic loss.[14] The State Board does not possess, and has not provided to the public for its careful consideration, information that would permit it to conclude that illegal discharges into ASBSs are in any meaningful way different in nature or kind from other stormwater discharges that cause well-documented degradation of water quality.[15]

This situation becomes even more troubling in the absence of evaluation by the applicants and the State Board of the impacts of granting an exception *for each ASBS and for each applicant.* The pollutant loading, compliance efforts, volume, etc. will be *distinct* for each exception applicant. Similarly, the receiving waters in each individual ASBS are unique in each area. These ASBSs were designated as "special" places, with discharge prohibitions to protect them. Reversal through the Exception process of these ASBS discharge prohibition protections

[12] Ocean Plan, Sec. III.J., at 23 (emphasis added).

[13] *In Re: California Department of Transportation* (State Board Order WQ 2001-08) (stormwater discharges from Pacific Coast Highway into Crystal Cove ASBS violated Ocean Plan).

[14] See General NPDES Permit for Phase II Municipal Separate Storm Sewer Systems, at 1; see also NRDC, *Testing the Waters* (2006), at CA-25.

[15] Southern California Coastal Water Research Project, *Final Report: Discharges into State Water Quality Protection Areas* (July 2003), at 1.

requires the same level of site-specific analysis that their original protection warranted. The EIR would need to evaluate in detail the specific impacts at each ASBS resulting from backsliding on the flat prohibition on discharges of waste to the ASBS.

Second, the State Board has not, and cannot, find that a general exception serves the public interest. Other exceptions have been granted only in very narrow situations where important and unique research and educational activities were at stake. For example, the State Board concluded that the Scripps exception would serve the public interest because Scripps' activities had "invaluable education and research benefits."[16] Scripps and Birch Aquarium's open seawater system depend on the ability to discharge waste seawater, and if the exception was not granted, the State Board concluded that Scripps and Birch Aquarium would be forced to shut down the open seawater system.[17] Similarly, the State Board found that the public interest was served by granting an exception for USC because USC "occupies a prominent role in marine science research and education, providing programs and facilities to USC and non-USC scientists and students and visitors from many other institutions."[18] Critically, the Board stated, "There are no viable alternatives to ocean disposed of waste seawater [sic] due to the remote location of the facility. If the exception is not granted, USC/WMSC will be forced to shut down its open seawater system."[19] Other relevant factors that "might arguably be justified as in the public interest" include situations in which moving or altering a discharge would cause greater environmental damage than would occur if the discharge remained.[20]

There is no similar special situation that would justify blanket exceptions to more than 1,000 illegal discharges, as proposed by the Exception. Among other things, there are no unique or "invaluable" research and education benefits associated with the discharges addressed by the proposed Exception. Moreover, Ocean Plan Section III.J.'s specific provisions on granting exceptions call for data and other justifications that contemplate assessing each potential exception on a case-by-case basis. Here, however, the State Board has made no such individualized findings in connection with the Exception. Rather, the Exception would impermissibly circumvent the requirement of having to find that an exception, as applied to each discharger, serves the public interest, as the Exception covers wholesale a range of 28 different discharger-applicants spanning the entire coast. The Exception thereby strips the ASBSs of their "special" protection as mandated by the Ocean Plan and reaffirmed by the Legislature. By

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[16] *Ocean Plan ASBS Exceptions*, based on 2005 presentation made by Sheila Vassey, State Board staff attorney, at 2, available at http://www.swrcb.ca.gov/plnspols/docs/asbs/instruct_asbs_opexceptions.pdf. See also Approving an Exception to the CA Ocean Plan for the University of California Scripps Institute of Oceanography (State Board Resolution No. 2004-0052), at 2.

[17] Approving an Exception to the CA Ocean Plan for the University of California Scripps Institute of Oceanography (State Board Resolution No. 2004-0052), at 2.

[18] Approving an Exception to the CA Ocean Plan for the University of Southern California Wrigley Marine Science Center (State Water Board Resolution No. 2006-0013), at 2.

[19] *Id.*

[20] *Ocean Plan ASBS Exceptions*, based on 2005 presentation made by Sheila Vassey, State Board staff attorney, at 2, available at http://www.swrcb.ca.gov/plnspols/docs/asbs/instruct_asbs_opexceptions.pdf.

essentially eliminating the waste discharge prohibition, the Exception proposes to treat ASBSs like any other water of the United States, despite their status as "intrinsically valuable."[21]

Finally, the timeframes set in the proposed Exception (at least four years, and possibly longer) prevent the meaningful, *required* examination of the Exception's effectiveness at each successive Triennial Review of the Ocean Plan, as is provided for in Section III.J of the Ocean Plan ("All exceptions issued by the State Water Board and in effect at the time of the Triennial Review *will be reviewed at that time*." (Emphasis added)).

Accordingly, the proposed Exception fails *all* of the required Ocean Plan tests for an exception to the discharge prohibition.

C. The State Board's Proposal Fails to Comply with the Clean Water Act.

The "Ocean Plan discharge prohibition is a water quality standard."[22] Like other water quality standards, the waste discharge prohibition is incorporated into, and is an enforceable requirement of, all NPDES permits coastwide. In violation of the Clean Water Act (CWA), however, the State Board not only has taken no action to enforce this water quality standard, but it also now proposes to reverse the standard by taking specific action to allow, rather than prohibit, numerous discharges indefinitely into most of the ASBSs.[23] As the California Appellate Court has stated, the State Board cannot make a *de facto* amendment to a water quality objective in a water quality control plan by simply refusing to take the action that it has identified as necessary to achieve that objective.[24] Here the Board goes even further than inaction, by affirmatively choosing to avoid enforcement of the prohibition. However, any such changes to the ASBS Prohibition Water Quality Standard ("ASBS WQS") must follow the requirements of the CWA and its implementing regulations.[25]

1. Variances from Water Quality Standards Require Compliance with the Same Substantive and Procedural Requirements as Removing a Designated Use.

EPA has accepted WQS variances, but only where specific criteria are met.[26] Variance procedures involve the same substantive and procedural requirements as removing a designated beneficial use.[27] These requirements are as follows:

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[21] California Ocean Plan, Appendix IV, at 37.

[22] *In Re: California Department of Transportation* (State Board Order WQ 2001-08).

[23] See *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 734.

[24] *Id*. at 731.

[25] The CWA requirements for relaxing or issuing variances to WQSs are, consistent with the ambitious goals of the CWA, onerous. A more straightforward means towards providing time for compliance to entities discharging to the ASBS are compliance schedules, in the form of CDOs or CAOs. Thus to the extent that the State Board genuinely seeks to more efficiently mitigate impacts of discharges to the ASBS, issuance of enforcement orders again recommends itself.

[26] *Water Quality Standards Handbook, Second Edition* (US EPA, 1994, updated 2007) ("WQS Handbook") at 5-12, available at http://www.epa.gov/waterscience/standards/handbook/ .

1. Is the use existing? If the use actually existed on or after 1975, whether or not they are included in WQS (40 CFR 131.3(e)), the existing use cannot be removed unless a more stringent criteria is added.
2. Is the use specified in section 101(a)(2) of the CWA? If so, removal of a use requires a use attainability analysis.
3. Is the use attainable?
4. Is a factor from 40 CFR 131.10(g) met? Even where steps one through three are demonstrated, the state must demonstrate that attaining the designated use is not feasible because:
    a. naturally occurring pollutants prevent attainment of the use;
    b. natural, ephemeral, intermittent, or low flow conditions or water levels prevent attainment of the use;
    c. human caused conditions or sources of pollution prevent attainment, and cannot be remedied or would cause more environmental to correct;
    d. dams, diversions, or other types of hydrological modifications preclude attainment, and it is not feasible to restore the water body to its natural condition;
    e. physical conditions related to natural features unrelated to water quality preclude attainment; or
    f. controls more stringent than those required by sections 301(b)(1)(A) and (B) and 306 of the CWA would result in substantial and widespread economic and social impact.
5. Has public notice and comment been provided for?[28]

Staff's analysis, and the substance of the proposed Exception, must meet these minimum standards. However, neither the NOP, its attached IS, nor the proposed Exception do so.

2. Variances Must Be Pollutant Specific, for a Limited Period of No More Than Three Years, and Provide Proof of Progress Towards WQS Compliance.

In addition to meeting the requirements of a use attainability analysis as set out at 40 CFR 131.10(g), variances must be discharger and pollutant specific, must be time-limited, must demonstrate reasonable progress towards attainment, and must either meet the water quality standard upon expiration of the variance or make a new, complete demonstration of "unattainability."[29]

EPA has approved variances from WQS where:

1. the State demonstrates a variance is justified after conducting the use attainability analysis described above;

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[27] *Id.*

[28] *Id*. at 2-7 – 2-8.

[29] *Id*. at 5-12.

2. the justification submitted by the State includes documentation that treatment more advanced than that required by sections 303(c)(2)(A) and (B) has been carefully considered, as well as alternative control strategies;
3. the more stringent State criterion is maintained and is binding upon all other dischargers;
4. the discharger given a variance for one particular constituent is required to meet the applicable criteria for other constituents;
5. the variance is granted for a specific period of time and must be rejustified upon expiration but at least every 3 years;
6. the discharger either must meet the standard upon the expiration of this time period or must make a new demonstration or "unattainability;"
7. reasonable progress is being made towards meeting the standards; and
8. the variance is subject to public review and comment.[30]

The proposed Exception as drafted fails to meet all of these requirements, including: providing a termination date for the variance, addressing specific parameters (instead providing a blanket exception for "waste"), requiring compliance within three years, providing criteria for determining compliance, or even providing criteria for determining *progress* towards compliance. The proposed Exception must meet all of the above standards to comply with the CWA.

3. CWA Anti-Degradation Analysis Is Required but Missing.

Water quality standards adopted or revised by States must comply with the anti-degradation requirements of the CWA.[31] The anti-degradation analysis requirement is specifically required for exceptions to Ocean Plan requirements.[32] Thus if the State Board intends to modify the ASBS WQS, it must undertake an anti-degradation analysis.

The IS attempts to circumvent this requirement by asserting that: "Granting the general exception will not violate federal anti-degradation requirements because water quality will not be lowered, but rather, will be improved within the ASBS affected."[33] However, the proposed Exception is by definition less stringent than the current, flat prohibition on discharges of waste in the Ocean Plan. Therefore, the inherently contradictory IS assertion that water quality will

[30] *Id*. at 5-12.

[31] 40 CFR § 131.12; 33 USC § 303(c)(4).

[32] *Letter from William Attwater, Chief Counsel, State Water Resources Control Board to Regional Board Executive Officers* (Oct. 7, 1987) ("Attwater Letter"), at 10. While the Attwater Letter also states that anti-degradation may not apply to the relaxation of water quality standards where the preceding standard has not been achieved, the only example provided posits a new water quality standard equal to the highest level of water quality achieved since 1975. The NOP, IS, and Exception provide no data indicating what level of water quality has been achieved in any of the ASBSs in question, or whether the Exception will ensure achievement of that level in those waters. To the extent that staff intends to make efforts to avoid antidegradation analysis, it must demonstrate that the measures set out in the proposed Exception ensure that water quality in the ASBS will be better than the best water quality achieved since 1975.

[33] Initial Study, at 14.

improve with weaker requirements must be grounded in a baseline of the virtually total failure of the State and Regional Boards to enforce the ASBS Prohibition to date. In other words, the IS appears to assume that *any* level of compliance with a relaxed standard, no matter how tenuous, is an improvement that should be embraced. This extraordinary argument violates federal and state (Resolution 68-16) anti-degradation requirements, and is extremely problematic public policy. Rather, the appropriate baseline for the overall review and anti-degradation analysis of the proposed Exception is ASBS water quality with *effective* implementation of the existing water quality standard (*i.e.*, the discharge prohibition).

a. Tier 3 Anti-Degradation Analysis Is Required but Missing.

40 CFR 131.12(a)(3) requires "Tier 3" anti-degradation analysis for Outstanding National Resource Waters ("ONRW"). These waters are defined as "waters of exceptional recreational or ecological significance."[34] While California ASBSs have not been officially designated as ONRW, the State Board's Chief Counsel noted that the protections provided in the Ocean Plan are equally stringent as for ONRWs, and that permits for discharges to ASBS are required to meet Tier 3 standards.[35]

40 CFR 131.12(a)(3) further prohibits any discharges that would lower water quality, other than temporary and short-term discharges such as those associated with construction or repairs, in ONRWs. Thus, the discharges allowed under the proposed Exception similarly would violate Tier 3 anti-degradation requirements. Before any exception can be adopted, a Tier 3 anti-degradation analysis must be conducted, and modifications incorporated to assure compliance with federal law.

b. At a Minimum, Tier 2 Anti-Degradation Analysis Is Required.

To ensure that water quality in "high quality" waters is "maintained and protected," 40 CFR 131.12(a)(2) requires "Tier 2" anti-degradation analysis for such "high quality" waters, which are defined as waters "[w]here the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." ASBSs are "high quality waters" under this definition. Therefore, before allowing a lowering of water quality as would occur under the proposed Exception, at a minimum the Board must conduct a review consisting of:

1. a finding that it is necessary to accommodate important economical or social development in the area in which the waters are located;
2. full satisfaction of all intergovernmental coordination and public participation provisions;
3. assurance that the highest statutory and regulatory requirements for point sources, including new source performance standards, and best management practices for non-point source pollutants are achieved.[36]

[34] 48 Fed. Reg. 51402 (Nov. 8, 1983).

[35] Attwater Letter, at 15.

[36] WQS Handbook, at 4-7.

The NOP, IS, and Exception do not currently include this analysis and must do so to comply with federal law.

4. SWMPs, SWPPPs or Other Permit Modifications Must Be Subject to Public Review and Comment.

The proposed Exception requires that the SWMP or SWPPP in the permit currently held by the exception applicants "…specifically address the prohibition of non-storm water runoff and the requirement to maintain natural water quality for storm water discharges to an ASBS…"[37] The proposed Exception nowhere explains how or when this SWPPP or SWMP modification is to occur, however, or whether any opportunity for comment from the public or US EPA would be provided. Because the SWPPP or SWMP are where all substantive pollution control measures are set forth, modification of the SWMP or SWPPP must include opportunities for a public hearing. Further, to the extent that any permit modifications reflect a weaker water quality standard set out in the Exception, an anti-backsliding analysis, including public notice and comment, must be conducted. This lack of public process and missing anti-backsliding analysis violates the requirements of the Clean Water Act and controlling legal precedent.

The Clean Water Act requires the opportunity for public hearing and comment—at the same level as for NPDES permitting—for WQS standard variances and for anti-degradation analysis.[38] The CWA requires agency review of any modification of the substantive terms of the permit designed to control pollutant discharge.[39] In cases where the substantive terms of the permit include the development and implementation of BMPs to prevent pollutant discharges, it is incumbent that the agency issuing permit coverage have the opportunity to review the BMPs selected prior to permit coverage to ensure that they will have the required effect of achieving the applicable pollutant reduction standards.[40] Agency review is appropriate even where the terms of the general permit identify detailed management practices, since absent review "nothing requires that the combination of [BMPs] that the operator [of the construction project] selects from this 'menu' will have the combined effect of reducing discharges to [the applicable pollution reduction standards.]"[41] In sum, the Ninth Circuit in *Environmental Defense Center* requires that:

> Stormwater management plans that are designed by the regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program [meets applicable pollutant reduction standards].[42]

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[37] Proposed Exception, at B-2.

[38] 40 CFR 131.20.

[39] See 33 U.S.C. §§ 1342(a), (b); 40 CFR § 122.62; *Environmental Defense Center v. EPA* (9th Cir. 2003) 344 F.3d 832, 841, 854-856, and 855 n.32.

[40] *EDC,* 344 F.3d at 854-856.

[41] *Id.* at 855 n.32.

[42] *Id.* at 856.

Finally, *EDC* provides that "technical issues relating to issuance of NPDES permit issuance should be decided … at a stage where the [permitting agency] has the greatest flexibility to make appropriate changes."[43]

The proposed Exception fails to meet these requirements. The proposed Exception provides for no review of the SWPPP or SWMP that will set forth the substantive pollution control measures chosen by the Exception applicants to prevent pollution of the ASBS. The proposed Exception appears to indicate that the SWPPP or SWMP will modified consistent with the terms of the underlying permits, but no deadline is set out for completing the modifications, and there is no indication which, if any, of those permits provide for public hearing and comment for this major modification. This scheme is inconsistent with the requirements of the Clean Water Act and controlling Ninth Circuit precedent. Evaluation of the effectiveness of the BMP scheme, progress towards compliance with WQS, or evaluation of compliance with the requirements of WQS variances and/or anti-degradation analysis are impossible when the substantive pollution control measures are deferred until some unknown future date. A detailed analysis of the BMPs to be put in place by each exception applicant, their effectiveness and appropriateness for the ASBS in question, and pollution reduction performance, must be part of the proposed Exception, and subject to public review and comment.

5. U.S. EPA Approval Is Required.

Finally, the NOP, IS and Exception do not state whether U.S. EPA review and approval will be sought. Pursuant to 40 CFR 131.20, all revisions of water quality standards must be submitted to the EPA, including supporting analyses for the use attainability analysis, for EPA's approval.

D. The NOP/IS and Exception Fail to Achieve Both the Letter and Intent of CEQA.

1. As Currently Drafted, the Proposed Exception Fails to Provide Sufficient Information to Meet the Requirements of a Programmatic EIR.

The NOP characterizes the EIR to be prepared as a "Statewide Program Environmental Impact Report for a General Exception." The Initial Study lists each of the dozens of exception applicants, from San Diego to Trinidad, but that is the extent of the detail provided. There is no information specific to the discharges or ASBSs, nor any indication that any other environmental review would be conducted (e.g., project specific EIRs) for each of the dischargers. Program EIRs can cover all activities within the scope of the EIR, so long as no new effects not examined in the EIR will occur, and no new mitigation measures are required.[44] However, without examining the potential effects specific to each ASBS (again, as required by the Ocean Plan Section III.J.), there will be no way to tell whether there will be new effects requiring mitigation.

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[43] *Id.* at 857 (citing EPA interpretation of permitting process requirements found in 44 Fed. Reg. 32,854, 32,885 (June 7, 1979)).

[44] 14 Cal. Code Regs. §15168(c)(1)-(2).

Given that the NOP/IS fails to propose conducting any project specific environmental review, the EIR must evaluate the impacts of granting an exception *for each ASBS and each applicant.* The pollutant loading, compliance efforts, volume, etc. will be distinct for each exception applicant. Similarly, the receiving waters in each individual ASBS are unique in each area. The EIR will have to evaluate in detail the specific impacts at each ASBS resulting from backsliding on the flat prohibition on discharges of waste to the ASBS, and instead allowing discharges of waste for an indeterminate period of time. Again, as discussed above, this is mandated by the Ocean Plan exception requirements, as well as by CEQA regulations.

In addition, given that the IS asserts without support that impacts to water quality will be mitigated to insignificance by the BMPs implemented under the proposed Exception, the EIR must evaluate in detail the effectiveness of the BMP programs proposed by each applicant, including the effectiveness in addressing pollutant loadings unique to each applicant. Further, the EIR must evaluate the effectiveness of monitoring programs to be implemented in evaluating impacts to the ASBS. Yet the NOP, IS and proposed Exception as currently drafted do not provide adequate information as to what BMPs will be implemented by dischargers, what monitoring programs will consist of, and most importantly, how compliance will be determined, to conduct an adequate environmental review. To comply with CEQA, the proposed Exception cannot defer the core of the program to the future, to be developed by the dischargers. Instead it must set forth these requirements so environmental review can be undertaken.

2. The Environmental Setting Skews the CEQA Analysis.

It is unclear from the NOP/IS whether the State Board is properly assessing the environmental baseline. A proper baseline is essential, as it constitutes the set of environmental conditions against which the agency will compare the proposed action's predicted impacts.

The EIR must describe the environmental setting, which includes not only the present physical environment, but also the current regulatory scheme in place. By the State Board's suggestion that an exception to the ASBS waste discharge prohibition (i.e., a reversal that allows the discharge of waste for an undefined time) will actually *improve* water quality, it appears that the State Board is ignoring the current environmental setting of an absolute prohibition against the discharge of waste into an ASBS.[45] Further, though the baseline for assessing impacts will "normally" be the "environmental setting" defined as "the physical environmental conditions in the vicinity of the project" at the time of the NOP,[46] CEQA clearly recognizes that there may be situations where the "past" or "future" baseline should be considered. This is such a scenario.

The Board proposes to *relax* the current regulatory regime to allow discharges of pollutants into biologically significant areas that need natural water quality, where those same discharges are now prohibited. By contrast, the *existing* regulation would actually incur future benefit on the environment once compliance is achieved, not harm. To be consistent with the underlying principles of CEQA, the current environmental setting should consider *both* the existing physical environment *and* the prospective future environment, which would be better without the proposed action than with it. This approach would also allow the decision-maker

[45] Ocean Plan, Sec. III.E.1., at 20.

[46] 14 Cal. Code Regs. § 15125(a).

and the public to more fully understand the eventual environmental consequences of the proposed action. This more accurate analysis is required.

As is currently written, the status quo for the CEQA analysis appears to be "no enforcement" of the Ocean Plan, rather than the actual "no discharge" prohibition. This clearly and significantly skews the CEQA analysis. For example, the water quality impacts of the Exception should be checked off as "potentially significant" on page 13 rather than "less than significant" in light of the major, long-term steps backwards from the existing discharge prohibition. A more accurate analysis, one that recognizes that there is a discharge prohibition in place, will impact the lens through which the EIR must be written.

3. The EIR Must Address Other Requirements, Including Local and Regional Impacts and Alternatives.

Just as the environmental baseline must address the local as well as the regional context, CEQA also requires that the EIR analyze the local and regional environmental impacts of a proposed project. "The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the *full* environmental context."[47] Accordingly, the State Board cannot simply prepare an EIR that analyzes discharges across the State as a whole. In order to comply with CEQA, the State Board must analyze each individual discharger's impact on a local level, as well as the cumulative impacts on a regional level.

Moreover, the EIR must address a reasonable range of alternatives.[48] The most obvious alternative, which is not mentioned in the IS, is enforcement of the current discharge prohibition, which would "feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project."[49] As to this alternative, along with others, the EIR must analyze this alternative and evaluate its comparative merits with the proposed Exception.[50]

Of course, the EIR must comply with all CEQA and other applicable regulations; the above two are examples of particularly important requirements that not mentioned in the IS.

4. There Are Numerous Contradictions Between the Initial Study Discussion and the Monitoring Data.

The IS discusses "baseline biological information" about the ASBSs, but does not attach this evidence or reference where it can be found. The evidence may (it is not clear in the Exception or the IS) come in part from the State Board's Draft Data Report released in April

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[47] 14 Cal. Code Regs. § 15125(c) (emphasis added).

[48] 14 Cal. Code Regs. § 15126.6.

[49] *Id*.

[50] *Id*.

2008[51] that summarized data submitted by the exception applicants in 2006, although the Draft Data Report acknowledged that "not all of that data has yet been assimilated into this report."[52] This lack of clear data in support of the Exception proposal simply fails to meet the requirements of the Ocean Plan Section III.J. exception process.

Further, it does not appear that the statements in the IS are supported by the evidence in the Draft Data Report. The IS states that, "Baseline biological information indicates that functioning marine communities persist in ASBS…."[53] Yet a report by Dr. Peter Raimondi evaluating these biological assessments concluded that many of the assessments made unsupported assumptions, and there was no way to determine whether the conclusions in the reports were in fact supported.[54] Dr. Raimondi further concluded that "the methods used in the assessments differ dramatically", "all the assessments were done either by the discharger or consultants to the discharger", "the basis for determining if a discharge is causing an impact differed dramatically among assessments", and "most dischargers are not clear about what the basis for determination of impact should be."[55] Accordingly, the assessments upon which the IS apparently bases its statement that "functioning marine communities persist in ASBS" are unreliable studies upon which to base such a statement.

As opposed to torturing the data to artificially support the Exception, we suggest that the EIR/IS let the data speak for itself. In the Draft Data Report, State Board staff provided the results of water quality sampling at reference sites, discharge sites, and of ocean receiving water. It noted that, "For copper, zinc and lead the means for discharges and ocean receiving water were substantially higher than for streams and background ocean levels."[56] This is true of nickel, silver, and PAHs as well.[57]

Constituent	**Stream**	**Ocean background water**	**Discharges**	**Ocean receiving water**	**Table B instantaneous max.objective**
Copper	15	13	151	139	30
Lead	11	12	125	96	20
Nickel	11	13	116	95	50
Silver	11	9	96	83	7
Zinc	11	13	131	92	200
PAHs	4	3	37	12	N/A

Table 1. Derived from Draft Data Report, at 91-92.

[51] http://www.swrcb.ca.gov/water_issues/programs/ocean/docs/asbs/draft_data_report.pdf.

[52] Draft Data Report, at 3.

[53] IS, at 7.

[54] Dr. Peter Raimondi, *Evaluation of ASBS assessments in rocky intertidal communities for the State Water Board*, March 6, 2009.

[55] Raimondi, at Summary.

[56] Draft Data Report, at 96.

[57] Draft Data Report, at 92.

As seen in the Table, in all instances, pollutant loads were far higher in the samples from discharge sites and of ocean receiving water than from the reference points. The Natural Water Quality Committee is undertaking a similar study to compare the water quality at discharge sites to reference sites. However, there is more than enough information now to demonstrate that there is no basis in law or science for the proposed, broad, lengthy Exception.

E. The Provisions of the Proposed Exception Are Also Critically Flawed

As discussed in detail above, we strongly contest the proposed Exception's legality, as well as its consistency with the science and its ability to achieve natural water quality in ASBSs. ASBSs are home to the State's most unique and sensitive marine communities, each one possessing a complex and fragile ecosystem.[58] To protect these communities, the State Board deliberately adopted in the Ocean Plan a prohibition on waste being discharged into ASBSs, thereby recognizing that the discharge of waste is inconsistent with natural water quality. Accordingly, as envisioned in the Ocean Plan, the most effective way to achieve natural water quality is to enforce the discharge prohibition as was originally intended and commanded. If, however, the Board chooses to continue this staff-intensive process that avoids the required elimination of anthropogenic pollution discharges into ASBSs for at a minimum of four, and likely more, years, significant modifications need to be made (in addition to compliance with the legal mandates above).

The defects in the Exception's provisions only further support the assertions above with regard to the Exception's deficiencies in law, science and practice. As an initial matter, the core objective of the proposed Exception is substantially flawed in that it fails to set forth an objective compliance measure. The Exception requires that wet weather discharges shall not alter natural water quality in an ASBS, but fails to establish what "natural water quality" is. This type of subjective standard is difficult to enforce, and therefore inconsistent with the State Board's express policy to issue readily enforceable, transparent permits.

Moreover, for the reasons explained in Section B.2 herein, a blanket exception approach is illegal. The proposed Exception must be discharger- and pollutant-specific, and include an expiration date for the individual dischargers at the end of three years. This would ensure meaningful, required Ocean Plan review every three years, consistent with Section III.J, and the Clean Water Act's variance requirement.

Additional, specific examples of problematic language in the Exception are provided below.

1. The Exception Is Vague and Too Limiting on Its Control of Permitted Point Source Discharges of Storm Water (pages B-1 – B-2).

On page B-1, the language is unclear whether discharges are allowed only under *all* of the conditions listed in 1.a.(3)(i)-(iv), or under *any one* of the conditions listed.

[58] See generally Draft Data Report.

On page B-2, the Exception authorizes non-stormwater discharges from "naturally occurring groundwater seepage via a storm drain." This can provide a significant loophole for seepages from septic systems, a major source of ASBS pollution, since septic waste may leak into the groundwater and discharge into an ASBS via "naturally occurring groundwater seepage."

2. Provisions Regarding Storm Water Management Plans (SWMP) and Storm Water Pollution Prevention Plans (SWPPP) Are Inconsistent and Fail to Ensure Compliance with the Law (pages B-2 – B-5).

For sections 2.a. and 2.b., the Exception lacks a deadline by which dischargers must meet these requirements. As written, the proposed Exception nowhere explains how or when this SWPPP or SWMP modification is to occur, or whether any opportunity for comment from the public or US EPA would be provided.

Section 2.c. should be eliminated. This provision is unnecessary because MS4s are already covered by other stormwater permits, and may lead to inconsistencies between the Exception and stormwater permits.

Section 2.d. is entirely inconsistent with the proposed Compliance Schedule, which requires compliance with natural water quality within four years.[59] Section 2.d. requires that "BMPs to control storm water runoff discharges (at the end-of-pipe) during a design storm shall be designed to achieve the following target levels:

(1) Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the Ocean Plan, or

(2) A 90 percent reduction in pollutant loading for the Table B parameters during storm events, for the applicant's total discharges. The baseline for the reduction is the effective date of the exception. The baseline for these determinations is the effective date of the exception, and the reductions must be achieved and documented within four (4) years of the effective date."

Section 2.d. is illegal under the Ocean Plan, which requires that waste not alter natural water quality. And indeed, as stated in the IS, one of the main components the Exception is to "ensure that wet weather runoff does not alter natural water quality in the ASBS…."[60] Yet section 2.d. is not designed to meet natural water quality. Table B levels are demonstrably higher than natural water quality, as seen in Table 1, above. If the end goal is simply to meet Table B objectives or a reduction in Table B objectives, what is the purpose of the Natural Water

[59] As discussed in Section B.2 and Section D of this comment letter, we believe that dischargers should achieve natural water quality within three years, consistent with the variance provisions of the Clean Water Act, the review provisions of the Ocean Plan, and for public policy reasons, as dischargers were first told by the State Board to cease their discharges into ASBSs in October 2004, five-and-a-half years ago.

[60] IS, at 7.

Quality Committee?[61] Accordingly, section 2.d. must be omitted from the Exception. Or, in the alternative, section 2.d. may be re-written so that the Table B instantaneous maximum objectives are target levels for dischargers to achieve between adoption of the Exception and achievement of natural water quality. But as written, section 2.d bears no relationship to the requirement that natural water quality be attained in ASBSs.

Next, any baseline for compliance should be the water quality levels when dischargers submitted their application for an exception, along with water quality samples from their areas. Or, in the alternative, the baseline should be defined by the Natural Water Quality Committee. But a baseline date that is set in the future, as in section 2.d.(2), will only encourage further pollution into ASBSs in order to artificially inflate the starting levels, thereby decreasing polluters' responsibilities to reduce loads under this provision.

"Design storm" in section 2.d. is defined as "one inch of precipitation per day." State Board staff has articulated to CCKA that provision is supposed to mean that BMPs must control pollution up to a storm of one inch per day, but that is not how the provision is actually worded. To reflect the stated intent, the provision instead should be "up to and including a design storm," rather than the current "during a design storm."

The following underlined phrase should be added to section 2.f. to ensure consistency with the Compliance Schedule:

> "The SWMP or SWPPP shall describe the non-structural BMPs currently employed and planned in the future (including those for construction activities), and include an implementation schedule <u>consistent with the requirements in the Compliance Schedule at section 3.</u>"

Sections 2.h. and 2.i. are confusing at best, and illegally extend the life of the Exception at worst. These sections appear to be imported directly from MS4 permits. Case law makes clear that water quality standards must be complied with in all NPDES permits and that the iterative process as reflected in 2.h and 2.i. is not a "safe harbor" from this core requirement.[62] However, in the context of the proposed Exception, the language of 2.h and 2.i could create confusion as to the dischargers' obligations to comply with water quality standards and maintain natural water quality. At a minimum, these sections should acknowledge that compliance with natural water quality is required, period; a discharger cannot fail to maintain natural water quality and then attempt to be shielded by the requirement to submit a RWL report. Moreover, the sections are flawed in that there is no end date to the approach in Sections 2.h. and 2.i, and it is unclear how the approach interacts with the Compliance Schedule and its associated deadline in Section 3(e).

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[61] Section 2.d also appears to be inconsistent with provision 3(e) regarding compliance schedule and the maintenance of natural water quality.

[62] See *Building Industry Ass'n of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 885-86; *County of Los Angeles v. California State Water Resources Control Bd.* (2006) 143 Cal.App.4th 985.

3. The Proposed Compliance Schedule Exceeds Ocean Plan Requirements and Ignores the Existing Discharge Prohibition (page B-5).

We generally support the concept of a Compliance Schedule, although it must be changed to a firm three years, rather than the indeterminate four-plus years currently proposed.

The Compliance Schedule also must be characterized as a Time Schedule Order to come into compliance with the discharge prohibition, rather than an ongoing allowance of discharges. Again, in this regard, the Exception's deadlines must allow for review consistent with the Ocean Plan's Section III.J. ("All exceptions issued by the State Water Board and in effect at the time of the Triennial Review will be reviewed at that time").

We do support acknowledging that dry weather discharges are prohibited. However, dry weather discharges are prohibited *currently*, not just as of the effective date of an Exception. It is again disappointing to have to remind the Board of the existence of the discharge prohibition, and to again request details on its implementation. Enforcement mechanisms for the dry weather discharge prohibition should be specified, to avoid the continued enforcement problems of the existing, decades-old, overarching discharge prohibition. Finally, given that dischargers that are the subject of the Exception acknowledged their own noncompliance with the discharge prohibition in 2004 by filing 28 exception applications for ongoing, illegal discharges, we believe that three years to comply with natural water quality from the effective date of the Exception is more than enough time.

4. The Exception Is Vague and Too Limiting on Its Control of Nonpoint Source Discharges (pages B-6 – B-7).

As is the case for point source discharges, the Exception is vague on whether discharges are allowed only under *all* of the conditions listed in 1.a.(3)(i)-(iv), or under *any one* of the conditions listed.

On page B-7, the Exception authorizes non-stormwater discharges from "naturally occurring groundwater seepage via a storm drain." This appears to provide another loophole for seepages from septic systems, since septic waste may leak into the groundwater and discharge into an ASBS via "naturally occurring groundwater seepage." Further, because page B-7 refers to nonpoint source discharges, the provision allowing "naturally occurring groundwater seepage via a storm drain" makes no sense, because a discharge via a storm drain is by definition a point source discharge.

On page B-7, sections 1.f. and 1.g. appear to overstate the law with regard to Navy activities. Without the following edits to sections 1.f. and 1.g. (deletions in strikeout; additions underlined), the Exception again appears inconsistent with the requirements of other environmental agencies and regulations:

> "At the San Clemente Island ASBS, the Navy conducts activities that include the discharge of military ordinance and explosives ~~is allowed~~ in accordance with the law as detailed in the Southern California Range Complex Environmental Impact

Statement, except in the two military closure areas in the vicinity of Wilson Cove and Castle Rock."

"At the San Nicolas Island and Begg Rock ASBS, the Navy conducts activities that include the discharge of missiles in accordance with the law as detailed in the Southern California Range Complex Environmental Impact Statement ~~is allowed~~."

5. The Nonpoint Discharge Planning and Reporting Requirements Are Inconsistent and Fail to Ensure Compliance with the Law (pages B-7 – B-9).

The Exception again fails to specify a necessary deadline by which dischargers must meet requirements, here the planning and reporting requirements in sections 2.a. and 2.b. on page B-7. Such requirements should be met within one year, as part of the requirement in the Compliance Schedule that dischargers describe their strategy to comply with the Exception.

Moreover, related to our comment about section 2.d. on page B-3, any requirement to achieve Table B levels is fundamentally inconsistent with the core goal of the Exception, which is to achieve natural water quality[63] from the adoption of the Exception. Accordingly, at a minimum the portion of section 2.b. below in strikethrough text must be deleted:

"The Pollution Prevention Plan shall address storm water discharges (wet weather flows) and, in particular, describe how pollutant reductions in storm water runoff that are necessary to comply with these special conditions, will be achieved through Management Measures and associated Management Practices (Management Measures/Practices). ~~Management measures to control storm water runoff during a design storm shall achieve the following target levels:~~

~~(1) Set as the Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the Ocean Plan; or~~
~~(2) By reducing pollutant loading for Table B parameters during storm events, for the applicant's total discharges, by 90 percent.~~

~~The baseline for these determinations is the effective date of the exception, and the reductions must be achieved and documented within four (4) years of the effective date."~~

Finally, similar to our comments above on Sections 2.h. and 2.i. (in the point source portion of the Exception), Sections 2.c. and 2.d. on page B-8 (in the nonpoint portion) are confusing at best, and illegally extend the life of the Exception at worst.

[63] As explained above, we believe the Compliance Schedule should require the attainment of natural water quality in no longer than three years, rather than the cited four years.

6. The Exception's Monitoring Requirements Fail to Provide the Information Needed to Track Compliance and Ensure Protection of ASBSs (page B-12 – B-16).

a. Core Discharge Monitoring Program

Water quality monitoring must be sufficient to determine whether the conditions of the Exception are being followed and progress made toward eliminating anthropogenic pollution.[64] Yet here, the core discharge monitoring program seems to have little or no connection with how compliance with the main provisions of the Exception, let alone the achievement of no anthropogenic pollution, will be measured and ensured.

For instance, although the Exception requires compliance with natural background levels within four years after adoption of the Exception, there is no monitoring requirement to actually test the water for progress towards compliance with natural background levels. In fact, one of the requirements—to analyze stormwater runoff for Table B objectives—only applies once every five years, which is *longer* than the full compliance term. If the intent of the Exception is to require Table B objectives to be met at some interim period between adoption of the policy and full compliance four years later as an interim target, then the monitoring requirement should reflect that fact. As written, the requirement to test water samples against Table B levels bears no rational relationship to what the IS says the Exception intends to achieve—natural water quality (*i.e.*, no anthropogenic pollution) within four years after adoption of the Exception.[65]

Further, section 2.a. on page B-13 requires sampling only from pipes 18 inches or larger, despite the fact that the 2003 Final Report states that 41% of discharges were caused by small storm drains.[66] The Final Report does not define the size of a so-called "small storm drain," but if it is smaller than 18 inches, than the Exception provides for no monitoring at almost half of the discharges in the State. Importantly, the size of a storm drain may not be indicative or representative of the concentration of the waste discharged; a very small drain may discharge high concentrations of harmful waste. As such, the storm drain monitoring requirement must be redefined to provide meaningful results that better assess waste in flows.

b. Ocean Receiving Water Monitoring Program

Inexplicably, the Exception allows applicants to elect to participate in a regional integrated monitoring program in lieu of an individual monitoring program, contrary to the fundamental nature of ASBSs as "special" places to be protected uniquely. The Exception fails to give any details about what this regional approach will entail, or how it will protect the unique ASBS ecosystems, which do not lend themselves by definition to an "averaging out" of impacts or assessments. Moreover, the Exception states that the regional approach "shall characterize

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[64] See 33 USC §§ 1318, 1342(a)(2); 40 C.F.R. §§ 122.44(i)(1), 122.41(j)(1), 122.48(b).

[65] IS, at 7.

[66] Southern California Coastal Water Research Project, *Final Report: Discharges into State Water Quality Protection Areas* (July 2003), at 7.

natural water quality in ocean reference areas.…"[67] This is in fact the task of the Natural Water Quality Committee, which has been conducting this research for over four years and which should be encouraged and supported to complete this decades-delayed project expeditiously.[68] Accordingly, like the core monitoring discharge program, the regional approach bears little or no relationship to ensuring *compliance* with the discharge prohibition and compliance natural water quality in each of the ASBSs, which is the mandate of the Ocean Plan.

7. Specific Attention Should Be Given to Impaired ASBSs.

Neither the Exception nor the IS address the issue of those ASBSs that have been identified as impaired under CWA Section 303(d). According to the Draft Data Report, at least a portion of 11 ASBSs (almost one-third of the total) are listed as impaired.[69] The Exception at a minimum should include a specific section on addressing impaired ASBSs, and impaired creeks or streams that discharge directly into an ASBS, specifying that these impaired ASBSs are a high priority both for purposes of compliance with section 303(d) and the Ocean Plan. We recommend in the alternative, however, that staff seriously reconsider the appropriateness of any exception allowing further discharges into impaired ASBSs. These discharges should be eliminated as soon as possible (certainly sooner than four years) under a Time Schedule Order.

E. Conclusion

We have spent many years advocating for enforcement what has been law for decades – a straightforward discharge prohibition into the state's most special marine habitats. Disappointingly, rather than celebrating the renewed health of ASBSs in the face of enforcement of this prohibition, we find ourselves, as illustrated in this letter and in Attachment A, continuing to fight regular attempts to circumvent or delay enforcement of this prohibition by both the regulated community and the state agency charged with protecting the ASBSs.

We again request that staff abandon this overly broad Exception process, and instead either develop discharge/applicant/ASBS-specific Exceptions as intended by the Ocean Plan, along with Time Schedule Orders for compliance that include interim milestones and a final deadline consistent with the review called for in the Ocean Plan; or issue enforcement orders in the form of cease and desist orders (CDOs) or cleanup and abatement orders (CAOs) providing for compliance schedules. As noted above, these orders could be issued in a matter of months, can contain the same substantive requirements as those in the proposed Exception, and would begin the process of bringing dischargers into compliance now.

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[67] Proposed Exception, at B-15.

[68] Again, by mandating a discharge prohibition, the Ocean Plan envisions "natural" water quality as the equivalent of water quality with no anthropogenic pollution discharges. So while the Natural Water Quality Committee's work may provide some useful insight into coastal health, it is not necessary in order to move forward with the decades-old discharge ban through CDOs and/or CAOs.

[69] Draft Data Report, at Appendix A.

The state's ASBSs are special places that deserve full implementation of the law. We urge you to take swift action to provide them with the protection that they need. Thank you for your careful attention to these comments.

Sincerely,

Linda Sheehan
Executive Director

Attachment